November 21, 2012

Jonathan Wayne
Executive Director
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333-0135

Dear Director Wayne:

We appreciate the opportunity to address the Commission on an issue of importance to MCCE and to the general public.

Recent cases have focused attention on the significance of a person's agreement to serve as a treasurer, "fund raiser," "decision maker," or in a variety of capacities indicated on one or more of the Commission's reporting forms. These capacities are established by Maine statutory law. *See, e.g.*, 21-A M.R.S.A. §1053(1) (PAC reports include name of "principal officer" and "primary fund-raisers or decision makers").

In the discussions surrounding these cases we have heard two assertions which we believe would interfere with the Commission's twin goals of effective disclosure and full compliance with statutory and regulatory requirements.

First, some comments before the Commission have suggested that candidates, treasurers and others under the Commission's jurisdiction routinely agree to serve "in name only" or agree to have their names included on various types of reports as "placeholders." Some of these comments imply that a person claiming this status is thereby not subject to the obligations inherent in serving in the named position.

The "placeholder" or "in name only" practice is harmful to the public's interest in disclosure. The public's reasonable understanding of these designations is at the very heart of effective disclosure. If the named person is not performing the obligations of the position, then who is; and why isn't the real person named instead? No one is forced to assume these roles. But once a person has agreed to serve in a certain capacity, the obligations attach to that person until either the obligations terminate or that person takes the steps necessary to remove him or herself from that position. Allowing a person to be named in such a position without actually assuming the

obligations of that position would render the statutory requirements meaningless and prevent the public from obtaining effective disclosure.

Some have suggested that a "firewall" can maintain a person's independence by effectively separating them from any involvement in other campaign activities. We believe a firewall has a valuable application in another, related context but not specifically as applied here. We agree that an external firewall or other insulating system should be recognized as a "best practice" for eliminating contact between candidates and other organizations or individuals making independent expenditures. We do not believe, however, that an internal firewall can effectively insulate a person from the responsibilities inherent in their position, such as the management of a PAC. No person should be able to assume the role of "decision maker" (for example) under the statute and then claim to be insulated from all decision making by setting up an internal firewall and delegating activities to another PAC employee or consultant on the other side of that firewall. Such a practice would only fuel public cynicism and eviscerate effective disclosure of who is truly responsible.

Our second concern is related, but slightly different. It relates to the nature of the commitment involved in these designated positions. Recent discussions have implied that agreeing to serve in one of these statutory positions is a mere reporting technicality and does not create any formal responsibility for the operation of the entity, its compliance with law, or the content of its reports. This argument has been implied even when the "placeholder" or "in-name-only" claim is not made.

We disagree with that argument. Allowing a person to satisfy the disclosure requirement without affirming the obligation that is being disclosed would be worse than no disclosure at all. We do not believe the legislature intended to create a system of disclosure without accountability.

We acknowledge that an opportunity exists to provide needed guidance and clarification on this issue. If this is not clarified, the Commission will face an increasing caseload of complicated and burdensome administrative and enforcement challenges as it attempts to sort through the intentions and explanations of those under its jurisdiction. We would advocate for a "bright line" rule making clear that these positions do have real responsibilities and that those named are obligated and accountable for fulfilling those responsibilities. This would have the healthy effect of ensuring that the public and all stakeholders appreciate the commitment made when a person agrees to be named in one of these positions. A bright line rule is far preferable for the regulated community and for the Commission. It would bring the Commission's disclosure and enforcement system into line with every other regulatory regime of which we are aware, where

signing or otherwise agreeing to serve in a particular capacity creates a real obligation for which the person and the reporting entity may be held accountable.

Thank you for considering our comments. We look forward to continuing to work with you and the Commission.

Sincerely yours,

John Brautigam

On behalf of MCCE